

STATE OF MICHIGAN
COURT OF APPEALS

DOROTHEA JOYCE RENFORTH,

Plaintiff-Appellant,

v

ENL STABLES, INC.,¹

Defendant

and

NANCY LAMPTON,

Defendant-Appellee.

UNPUBLISHED

March 22, 2002

No. 227038

Wayne Circuit Court

LC No. 98-816525-NO

Before: Hood, P.J., and Gage and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right an order denying her motion for judgment notwithstanding the verdict or new trial following a jury verdict of no cause of action in this premises liability case. We affirm.

Plaintiff first argues that she was denied due process when the trial court erroneously instructed the jury on premises liability. However, plaintiff waived this issue for appeal when she acquiesced to the instructions in the trial court. Therefore, we decline to review the issue as plaintiff may not assign as error on appeal something that her own counsel deemed proper at trial. To do so would permit counsel “to harbor error as an appellate parachute.” *Hilgendorf v St John Hospital and Medical Center Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001); *Schulz v Northville Public Schools*, 247 Mich App 178, 181 n 1; 635 NW2d 508 (2001), citing *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Plaintiff next contends that the trial court erred by denying her motion for judgment notwithstanding the verdict because there was no question of material fact as to whether the

¹ ENL Stables, Inc. is not a party to this appeal. Therefore, references to “defendant” in this opinion are to defendant Lampton.

dangerous condition was open and obvious. We disagree. This Court reviews a trial court's decision to grant or deny a motion for judgment notwithstanding the verdict de novo. *Barrett v Kirtland Community College*, 245 Mich App 306, 311; 628 NW2d 63 (2001). "In reviewing a decision on a motion for JNOV, this Court must view the testimony and all legitimate inferences in the light most favorable to the nonmoving party. If reasonable jurors honestly could have reached different conclusions, the jury verdict must stand. Only if the evidence fails to establish a claim as a matter of law is JNOV appropriate." *Id.* at 311-312.

To establish a negligence claim, a plaintiff must demonstrate (1) that the defendant owed the plaintiff a duty, (2) a breach of that duty by the defendant, (3) causation, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The open and obvious doctrine applies to the question of whether a possessor of land owes a duty. *Riddle v Mclouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). The possessor of land owes no duty to the invitee if the dangers are known to the invitee or if the dangers are so obvious that an invitee might reasonably be expected to discover them, unless the possessor should anticipate the harm despite knowledge of it on behalf of the invitee. *Id.* The determination whether a danger is open and obvious depends on whether it is reasonable to expect that an average user with ordinary intelligence would have discovered the danger on casual inspection. *Hughes v PMG Building Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997).

Before trial, the parties stipulated that plaintiff was an invitee. There was conflicting testimony at trial regarding whether the condition was open and obvious because defendant and defendant's husband testified that there was a visible three to four inch gap between the steps and trailer, and defendant said that she warned plaintiff to watch her step before entering the trailer. Plaintiff testified that defendant gave no warning, and plaintiff's daughter testified that she looked at the steps right after plaintiff fell and saw no gap between the steps and trailer. Viewing the evidence in a light most favorable to defendant, we believe reasonable jurors could have honestly reached different conclusions with respect to whether the gap existed and whether the gap was open and obvious, and therefore, the jury verdict must stand. *Barrett, supra*.

Finally, plaintiff argues that the trial court abused its discretion when it denied her motion for a new trial. Plaintiff contends the trial court should have granted a new trial because it erroneously precluded her from introducing photographs of the steps and trailer where she fell, thereby denying her a fair trial. A trial court's denial of a motion for new trial is reviewed for an abuse of discretion, *Morinelli v Provident Life and Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000), and may be reversed only where the denial was so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000). Similarly, a trial court's decision to exclude evidence is reviewed for an abuse of discretion. *Davidson v Bugbee*, 227 Mich App 264, 266; 575 NW2d 574 (1997).

"To lay a proper foundation for the admission of photographs, a person familiar with the scene depicted in the photograph must testify, on the basis of personal observation, that the photograph is an accurate representation." *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 133; 492 NW2d 761 (1992). However, photographs may still be admissible despite changes in the scene, as long as someone testifies with regard to the changes. *Id.* Plaintiff's photographs were taken approximately two to three months after she fell on defendant's property, and they depicted (1) a smaller gap between the steps and trailer than existed when

plaintiff fell, and (2) a handrail that defendant attached to the steps after plaintiff fell. The trial court correctly excluded the photographs because they depicted a subsequent remedial measure, MRE 407, and did not accurately represent the gap that existed between the steps and trailer at the time plaintiff fell. The trial court, therefore, did not abuse its discretion when it excluded the photographs and denied plaintiff's motion for a new trial.

Affirmed.

/s/ Harold Hood

/s/ Hilda R. Gage

/s/ Christopher M. Murray